

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

19070

FILE: B-195921

DATE: July 31, 1981

MATTER OF: Department of Agriculture Meat Inspectors -
Fair Labor Standards Act

- DIGEST:**
1. Office of Personnel Management is correct in holding that certain Department of Agriculture red meat inspectors who are required to wear protective clothing and equipment and to keep them clean, are involved in an integral and indispensable part of their principal activity under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1976), when they are engaged in clothes-changing and clean-up activities at their worksites. GAO will not disturb OPM's factual findings unless clearly erroneous. Paul Spurr, B-199474, April 2, 1981, 60 Comp. Gen. _____.
 2. Section 3(o) of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq. (1976), does not exclude red meat inspectors clothes-changing and cleanup activities from being compensable hours worked under FLSA. There was no custom or practice to exclude such activities from being compensable as meat inspectors union had always challenged Department of Agriculture's determination to exclude such activities from being compensable from the time FLSA was made applicable to Federal employees. Moreover, Agriculture had paid for a certain amount of clothes-changing and cleanup time in the past.

The Honorable Bob Bergland, while he was Secretary of Agriculture, requested our decision as to whether time spent by food inspectors of the Department of Agriculture's

[Application of Fair Labor Standards Act to Agriculture
Meat Inspectors]

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Food Safety and Quality Service (FSQS) in clothes-changing and cleanup activities, is hours of work under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq. (1976). Comments on the Secretary of Agriculture's request were solicited and received from the Office of Personnel Management, the Department of Labor, and the American Federation of Government Employees (AFGE), which represents the food inspectors who are the subject of this decision.

For the reasons stated below, we affirm the Office of Personnel Management's determination that time spent by FSQS meat inspectors in clothes-changing and cleanup activities is compensable hours of work under FLSA.

FACTS

The Department of Agriculture states the facts giving rise to this case as follows:

"At issue is a difference of opinion between FSQS management and Local 2722 over pay for time spent in clothes-changing and cleanup activities. The union considers such time to be an integral part of the principal duties of slaughter inspection and, therefore, hours of work. Management maintains that such activities are considered as preliminary and postliminary to principal duties rather than an integral part.

"All parties are in agreement that other activities such as knife sharpening, drawing and securing keys, badges, and tags, cleaning necessary equipment, and completing administrative paperwork are hours of work under FLSA."

* * * * *

The Department of Agriculture reports that it employs some 7,500 food inspectors who inspect meat and poultry but the Position Classification standards do not formally recognize any distinction between those inspectors engaged in red meat inspection and those engaged in poultry inspection. The Department of Agriculture report continues:

"Although the OPM decision concerns only those food inspectors employed in red meat slaughter establishments within the Green Bay area, it is an inescapable conclusion that if the decision is implemented in that area, it will have nationwide impact in that FSQS will have to initiate action to insure consistent and equitable treatment of all red meat slaughter inspectors. The impact of this decision on the food inspectors engaged in poultry slaughter inspection or processed product inspection is unknown at this time. In addition, FSQS employs agricultural commodity graders who also work in red meat activities. Here, too, the impact of this decision is unknown.

"In 1976, USDA requested clarification of pay entitlements of meat and poultry inspectors from the Civil Service Commission, Bureau of Policies and Standards. A number of questions were asked, including a question regarding preparation and cleanup time as hours of work under FLSA. Mr. Frank S. Mellor, Acting Chief, Pay Policy Division, responded on July 28, 1976. * * * The policy set forth in Mr. Mellor's letter has been applied by FSQS and USDA since that date with regard to pay entitlements for food inspectors who engage in cleanup and clothes-changing activities prior to and after the workday. However, the guidance provided in 1976 appears to conflict with the * * * [recent OPM decision made on this matter] and contributes to the uncertainty USDA and FSQS officials are experiencing in regard to proper interpretation of the FLSA."

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The recent OPM decision referred to in the above was made as a result of an FLSA complaint against FSQS filed by the President and members of Local 2722, National Joint Council of Food Inspection Locals, AFGE, on behalf of food inspectors involved in red meat slaughter inspection operations in Green Bay, Wisconsin. In it, Mr. Keith Roelofs, Regional Director for the Chicago Region (now the Great Lakes Region) of the Office of Personnel Management, ruled that time spent by meat inspectors in clothes-changing and cleanup activities is compensable hours of work.

The Secretary of Agriculture disputes OPM's decision and contends that the time spent in performing clothes-changing and cleanup activities is primarily for the employees' benefit. He states that the inspectors are not required to wear a uniform, and the agency does not furnish any work clothes, and the only requirement is that their clothes be clean and washable. Laundry service or disposable work garments are provided by the establishments where the inspections are performed. In addition he states that not all red meat slaughter inspectors get soiled on the job to the degree indicated in the OPM decision.

In view of the above conditions and in view of its interpretation of the guidance given it in 1976 by the Civil Service Commission, Agriculture believes that the time spent in clothes-changing and cleanup activities is not hours of work. Moreover, Agriculture argues that even if the above activities are determined to be hours of work then section 3(o) of FLSA excludes them from the provisions of FLSA.

As indicated above we received comments on the Secretary of Agriculture's submission from OPM, the Department of Labor, and from Mr. Kenneth T. Blaylock, President, American Federation of Government Employees. Although the Department of Labor is the Administrator of FLSA for the non-Federal sector, OPM administers FLSA as to most Federal employees, including those of the Department of Agriculture. 29 U.S.C. § 204(f) (1976). In his report

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to us on the Secretary of Agriculture's submission, Mr. Alan K. Campbell, former director of the Office of Personnel Management, states that the decision of OPM's Great Lakes Region was correct and urges us to uphold that decision. The Department of Labor also states that the meat inspectors clothes-changing and cleanup activities are a part of their principal activity or activities. Mr. Blaylock likewise urges us to find OPM's determination that the clothes-changing and cleanup time is compensable working time.

ISSUES

Three issues are raised by the Secretary of Agriculture's submission.

1. Is the time spent by food inspectors in clothes-changing and cleanup activities hours of work under FLSA?
2. Did OPM give Agriculture contradictory advice and, if so, does that have an impact on the answer to the first issue?
3. Does FLSA section 3(o) exclude the clothes-changing and cleanup activities from the FLSA's hours of work definition?

We shall discuss such issues in order below.

OPINION

1.

Section 4 of the Portal-to-Portal Act, 29 U.S.C. § 254(a), provides in pertinent part that:

"* * * no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended * * * on account of the

failure of such employer to pay an
employee * * * overtime compensation, for
or on account of any of the following
activities * * * --

* * * * *

"(2) activities which are pre-
liminary to or postliminary to said
principal activity or activities,

which occur either prior to the time
on any particular workday at which such
employee commences, or subsequent to the
time on any particular workday at which
he ceases, such principal activity or
activities."

Both the Department of Agriculture and the Office of
Personnel Management rely on the holding in Steiner v.
Mitchell, 350 U.S. 247 (1956), which interprets the Portal-
to-Portal Act, to arrive at their opposing conclusions on
whether the clothes-changing and cleanup time is hours of
work. The issue before the court in Steiner was:

" * * * whether workers in a battery
plant must be paid as a part of their
'principal' activities for the time
incident to changing clothes at the
beginning of the shift and showering
at the end, where they must make
extensive use of dangerously caustic
and toxic materials, and are compelled
by circumstances, including vital con-
siderations of health and hygiene, to
change clothes and to shower in facilities
which state law requires their employer
to provide, or whether these activities
are 'preliminary' or 'postliminary' with-
in the meaning of the Portal-to-Portal
Act and, therefore, not to be included

in measuring the work time for which compensation is required under the Fair Labor Standards Act." 350 U.S. at 248.

The Supreme Court found that the legislative history showed that the Senate intended the activities of clothes-changing and showering to be hours worked under FLSA "if they are an integral part of and are essential to the principal activities of the employees." 350 U.S. at 254. The court then held that the clothes-changing and showering activities of the battery plant workers were clearly an integral and indispensable part of the battery plant workers' principal activity of employment. 350 U.S. at 256.

The Department of Agriculture argues that the food inspectors clothes-changing and cleanup activities are not "integral" or "essential" to their principal activity of inspecting meat. Agriculture states that there is no reason to believe food inspectors could not perform inspection activities without putting on certain clothes.

The Office of Personnel Management's Great Lakes Region, however, applied the basic clothes-changing and cleanup test in Steiner to the facts in this case after making an on-site inspection and investigation and issued the following findings and determination:

"Our finding is that the inspectors involved in red meat slaughter inspection operations in Green Bay circuits are, for reasons other than mere convenience, required to spend time in work preparation, clothes changing and clean up which we conclude to be an integral part of their principal activity. Although no specific uniform is required for such work and inspectors furnish their own work clothing, it is clear that certain garments (coats, frocks) head coverings, and safety devices such as aprons, wrist guards, scabbards, etc., are necessary to perform the work. Visits to all three 'kill floor' operations provided direct visual evidence to confirm that inspectors

become soiled with blood and ingesta during the normal work day. It is not a convenience that such protective clothing must be worn and changed, or that such employees clean up at the end of the day. It would be unreasonable to expect that bloody, bacteria-ridden garments be worn home or to a public place such as a restaurant or grocery store. We maintain that it is the principal activity, red meat slaughter inspection, that makes the clothing unpresentable and which also makes the wearing of such clothing indispensable to its performance. Analogous to and consistent with the chemical plant and battery plant employee examples, such a principal activity cannot reasonably be expected to be performed without the wearing of certain clothes and equipment. The time spent on the changing of such clothing at the beginning and end of the workday is hours of work and is thus compensable." (Emphasis added.)

As OPM points out, although no specific uniform is required, the Food Safety and Quality Service's Meat and Poultry Inspector's Manual of Procedures, Personal Hygiene, Subpart 8-C, which is attached to this decision as an Appendix, does require the use of certain garments, head coverings and safety devices and requires that soiled or contaminated clothing be changed as often as necessary throughout the workday.

Both the Department of Agriculture's regulations and the job description for meat inspectors place a great stress on sanitation procedures and the necessity that inspectors ensure the cleanliness of the meat slaughtering plant as well as their own persons. Moreover, as noted in Mr. Bergland's submission, and specifically pointed out in AFGE's comments, there is a requirement that meat slaughtering establishments provide commercial laundry service for inspectors' outer work clothing or disposable garments.

The Department of Labor, which administers FLSA for the non-Federal sector, supports OPM's decision:

"We agree with this result. As applied to the facts in this case, it is in accord with Steiner v. Mitchell, 350 U.S. 247 (1956) and many other similar cases. The Department of Agriculture asserts that the food inspectors could perform their duties without wearing special clothes, and that therefore the clothes changing and washup activity is not really an integral or essential part of their job. However, the OPM on-site investigation expressly found that the food inspectors 'become soiled with blood and ingesta during the normal workday.' Here, as in Steiner and subsequent cases, where an employee's job necessarily results in his clothes becoming soiled and unpresentable, clothes changing and cleanup activity is plainly part of the 'principal activity or activities' within the meaning of Section 4 of the Portal-to-Portal Act."

It is evident that, given the fact that these meat inspectors get extensively soiled or contaminated and given the rigorous sanitation procedures imposed on the meat inspectors, the clothes-changing and cleanup activities are not merely for the convenience of the meat inspectors. We have held that given OPM's procedures for processing FLSA complaints, which procedures include an opportunity for on-site investigations and a review of all pertinent evidence, we would not disturb OPM's factual findings unless clearly erroneous and the burden of proof lies with the party challenging those findings. Paul Spurr, B-199474, April 2, 1981, 60 Comp. Gen. _____. Therefore, we believe it was reasonable for OPM to find that clothes-changing and cleanup activities which occur before and after the regular work shifts are necessary extensions of the red meat inspectors' work and are required of the employees as an integral and indispensable part of the sanitation measures required of red meat inspectors.

2.

Nor do we find that OPM gave the Department of Agriculture conflicting advice as to whether clothes-changing and cleanup activities are compensable work hours under FLSA. In 1976, OPM supplied the following information to the Department of Agriculture in response to Agriculture's question as to whether preparation and cleanup time of meat inspectors was hours worked under FLSA.

"Other activities which may be performed outside the workday and, under normal conditions, would be considered 'preliminary' or 'postliminary' activities include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks."

However OPM also stated in the same letter:

"However, if an activity is performed merely for the convenience of an employee and is not directly related to the employee's principal activity or activities, it should be considered a 'preliminary' or 'postliminary' activity rather than a principal part of the activity. For example, if an employee cannot perform his principal activity without putting on certain clothes, the changing of clothes would be compensable. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activity, it should be considered a 'preliminary' or 'postliminary' activity under the Portal Act."

In light of the facts presented, OPM's determination that red meat inspectors' clothes-changing and cleanup activities are hours worked reasonably applies the guidance given Agriculture in 1976.

3.

The Department of Agriculture finally argues that even if we find the clothes-changing and cleanup activities to be an integral part of food inspection jobs, FLSA section 3(o) exempts such activities from being deemed compensable hours of work. Section 3(o) reads:

"Hours Worked.--In determining for the purposes of sections 6 [minimum wage] and 7 [overtime] the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee."

Agriculture contends that, since it has never paid red meat inspectors for clothes-changing and cleanup activities and payment for such activities has been in dispute ever since the effective date of Federal employees' coverage under FLSA, such nonpayment is a ". . . custom or practice under a bona fide collective-bargaining agreement" as contemplated by section 3(o).

In determining whether the clothes-changing and cleanup activities are excluded because of custom or practice, OPM was guided by the Department of Labor's instructions in section 31b 01 of its Field Operations Handbook which states as follows:

"There are certain instances in which clothes changing and washup activities by employees on the premise of the employer are integral parts of the principal activities of the employees because the nature of the work makes the clothes

changing and washing indispensable to the performance of productive work by the employees, but the collective bargaining agreement in effect in the establishment is silent as to whether this time should be included in, or excluded from hours worked. Where such clothes changing and washup activities are the only preshift and postshift activities performed by the employees in the premises of the employer [and] the time spent in these activities has never been paid for or counted as hours worked by the employer, and the employees have never opposed or resisted this policy in any manner although they have apparently been fully aware of it, there is a custom or practice under the collective bargaining agreement to exclude this time from the measured working time, and FLSA Sec. 3(o) applies to the time. (Emphasis added.)"

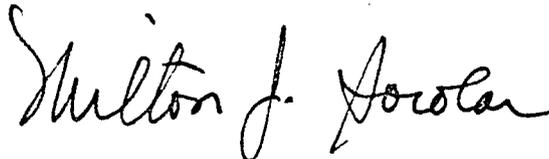
The Office of Personnel Management found that the food inspectors union had indeed opposed or resisted the determination that the clothes-changing and cleanup activities were not compensable under FLSA. Moreover, OPM found that in several plants inspectors were in fact receiving compensation for these activities during the 8-hour day. In light of this and the Department of Agriculture's admission that compensation for such activities has been a matter of discussion "* * *" since the effective date of the FLSA amendment * * *," we find that no custom or practice excluded the clothes-changing and cleanup activities from being considered as compensable hours of work. Secretary of Labor, United States Department of Labor v. E. R. Field Inc., 495 F. 2d 749 (1st Cir. 1974).

* * * * *

As noted above, the Department of Agriculture has also expressed concern that the determination of OPM's Great Lakes Region that red meat slaughter inspectors are performing hours of work when they perform clothes-changing and cleanup activities may have an impact on all other food inspectors engaged in poultry slaughter inspection or processed product inspection. We would point out, however, that merely because one type of FSQS inspector has been found to be engaged in hours worked when performing such activities does not mean that all inspectors must also be found to be engaged in hours worked when performing clothes-changing and cleanup activities. A determination of whether an employee has performed hours worked under FLSA depends not on the position classification standards, which are similar for various types of food inspectors, as the Department of Agriculture suggests, but on the actual conditions of employment. It may be that other inspectors change clothes and cleanup in circumstances different from those here and they may do so for their own convenience, and not because such activities are an integral and indispensable part of their duties. The application of this decision is, thus, limited to the FSQS inspectors engaged in red meat inspection in circumstances described herein and to those inspectors who are similarly situated.

Conclusion

In this decision, therefore, we uphold OPM's determination that red meat slaughter food inspectors of the FSQS within the Green Bay area perform work under FLSA when they are engaged in clothes-changing and cleanup activities. Moreover, we find that no express agreement or custom or practice excluded the clothes-changing and cleanup activities from being considered as compensable hours of work.



Acting Comptroller General
of the United States

APPENDIX

Meat and Poultry Inspector's Manual of Procedures

PERSONAL HYGIENE

Subpart 8-C

(Regs: M-308; P-Subpart H)

"Personnel with clean hands, clothing, and good hygienic practices are essential to the production of clean and wholesome products.

" 8.16 WEARING APPAREL

"(a) Garments

All garments (coats, frocks, etc.), shall be clean, in good repair, and of readily washable material. Street clothes shall be covered while handling exposed edible product. Clothing that becomes soiled or contaminated during the workday shall be changed as often as necessary. White or light-colored garments are desirable.

"(b) Head Covering

All persons working where exposed product is handled must wear suitable head coverings to prevent hair from falling into the product.

"(c) Aprons, Wrist Guards

Safety devices, such as aprons, wrist guards, etc., shall be of impervious material, clean and in good repair. Persons handling edible products shall not wear leather aprons, wrist guards, or similar devices unless clean, washable coverings are used over them.

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"(d) Gloves

When during post-mortem inspection it becomes necessary for the inspector to wear gloves, such gloves should be of the surgical type.

Cotton gloves worn by persons handling edible product should not have dyed cuffs that may contaminate product and should be replaced when contaminated.

Mesh gloves or guards must be cleaned and sanitized when contaminated and at the end of daily operations. If such gloves are worn by eviscerators and head or bung droppers, they shall be covered with gloves of impervious material. Mesh gloves must be promptly replaced if the links are broken or missing.

Light-colored rubber or plastic gloves may be worn by product handlers, provided they are clean and in good repair."

* * * * *

"(h). Footwear

Shoes and boots should be appropriate for operations and, in most cases, of impervious material.

Eviscerator's boots. Persons working on moving top tables shall wear white or otherwise identifiable impervious boots, worn only on the table and adjacent boot cleaning compartment. They must use other footwear when walking to and from working area. To prevent contamination splash to viscera, carcasses, and table, such persons must clean and sanitize contaminated aprons, knives, or footwear in boot cleaning compartment.

"(i) Personal Equipment

Cloth or twine wrappings on implement handles and web belts are not permitted."